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MAY 24 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

May 24, 1995

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW Room 222
Washington, DC 20554

Dear Mr. Caton:

Re: MM Docket 92-266

On behalf of the Center for Media Education and the Consumer Federation of America, please find enclosed two copies of a written *ex parte* presentations for Special Assistant John Nakahata regarding the above rulemaking.

Copies of this memo will be hand-delivered today.

Sincerely,

Jeff Chester

Jeffrey Chester
Center for Media Education

Enclosures

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List ABCDE

1511 K Street, NW   Suite 518   Washington, DC 20005   202-628-2620   Fax: 202-628-2554   cme@access.digex.net

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C E N T E R   F O R   M E D I A   E D U C A T I O N

May 24, 1995

John Nakahata
Special Assistant
Office of Chairman Hundt
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Dear ~~Mr. Nakahata~~ John,

Enclosed is a memo requested by the staff of the Cable Services Bureau regarding the policies governing leased access cable channels.

As you know, Congress passed leased-access provisions in the 1984 Cable Act in order to ensure diversity in programming. For a variety of reasons, these policies have not worked, even after the implementation of the 1992 Cable Act rules. CME believes that making leasing work—particularly for nonprofits—is a crucial step in the development of an "information highway" that is open, nondiscriminatory, and diverse.

Our main concern is that nonprofit organizations should be able to provide their educational and informational services on video platforms. To that end, CME has proposed that the FCC establish nonprofit rates for leasing cable channels. We have enclosed a series of previous filings, memos and other materials that describe our work at the FCC over the past two years.

We hope that we can work with you to expedite this process. I will be contacting you shortly.

Sincerely,

Jeff Chester
Executive Director

Enclosures

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CENTER FOR MEDIA EDUCATION

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MAY 24 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

May 23, 1995

Kathy Franco
Policy and Rules Division
Cable Services Bureau
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Dear Ms. Franco:

Thank you for your recent fax requesting more information about the views of the Center for Media Education and the Consumer Federation of America (hereinafter "CME") on the reconsideration of cable leased-access rules. We hope our answers below to the Cable Services Bureau's questions are helpful.

As you know, CME proposes that the FCC establish a special rate for nonprofit programmers to lease cable channels, just as there are currently different rates for other types of programmers. The nonprofit rate should be set at the incremental cost, which is the lowest rate possible without the suggestion of a subsidy. To make sure commercial programmers do not take all the leased-access capacity, the FCC should set aside 25 percent of leased access capacity for noncommercial use. The set-aside would sunset in a few years if not utilized.

Here are CME's responses to the questions posed, which are reprinted in italics.

1) Under the law and within the leased channel quota, could a set-aside be established for local programming, including both nonprofit and for-profit programming? Are local programmers' interests similar to those of nonprofit programmers? Should LPTV be included with local programmers?

The Federal Communications Commissions (FCC) can set aside leased-access capacity for different purposes, including noncommercial services, local programming and other categories within the FCC's reasonable discretion. In the 1992 Cable Act, Congress gave the FCC the authority to establish the rates, terms and conditions of leasing cable channels. CME believes the FCC should, as Congress expected, establish a nonprofit set-aside of which local, regional and national organizations would take advantage.

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Local programmers don't necessarily have interests similar to those of nonprofits. Local for-profit organizations could start up infomercial networks, local real estate channels, and other services that would be distinct from the programming of nonprofit organizations. Nonprofits would establish educational and informational services where advertising would not determine the content. The reasons for establishing a set-aside for each party would be different. CME would not view a local set-aside as a substitute for a nonprofit set-aside.

Low Power Television should be considered as a local programmer only if the station has a significant amount of local programming. We would not recommend a special status for Low Power Television.

2) Assuming a temporary start-up set-aside for nonprofits, what are the practical implementation problems? What leased (or other) programming would appear while nonprofits were in the development stage?

The biggest implementation problem that we expect is that cable operators will attempt to subvert the law and make it difficult to lease channels, as they have been doing since the 1984 law established the leased-access provisions. The FCC should lay down clear and easy-to-implement guidelines so that the need for enforcement is minimal.

Under the statute, the operators are allowed to use channels that are not being leased. However, CME believes that if leased-access capacity is made affordable and accessible, nonprofit organizations will provide information services through this medium within a reasonable amount of time.

CME believes that a permanent set-aside for nonprofit programmers should be established. A set-aside needs to be permanent in order to prevent commercial interests from absorbing channel capacity. CME would be willing to support a sunset period, whereby after a certain amount of time (3-5 years, for example), if all the set-aside is not used up, the excess capacity will then be available for commercial leased-access. CME supports a set-aside with this type of "triggered sunset" provision, rather than one that is "temporary."

3) How long should leases be allowed to run? Is a different answer needed if channel access is provided for on a first-come, first-served basis or by some form of random selection?

Potential programmers—commercial or noncommercial—won't make significant investments with only short-term carriage arrangements. The lease time needs to be the same or longer as the agreements for traditional channels. One suggested time would be 15 years, the typical length of a cable operator's franchise agreement. Another suggestion would be to make sure the period is *at least* 10 years, or another suitable amount of time.

The length of the leases should not be affected by the method by which the capacity was allocated, whether it be first come, first-served, random, or some other basis.

4) What process should an operator use to allocate a channel if two programmers submit use requests at the same time?

As we have explained in a previous memo, we suggest that channel capacity be distributed on a first-come, first-served basis. This would apply to both programmers who wanted to lease entire channels and to those who only wanted to program a channel part-time.

Since there would be only a couple of noncommercial leased-access channels on many of the nation's cable systems, CME proposes that one of these channels be designated for part-time leased access, and be distributed using mediation. If a cable system has two noncommercial leased access channels, one channel can be taken up by a single programmer, if it is requested, but the second channel would then need to be divided among the remaining programmers who have requested capacity.

For this "last" channel, the users would pick a mediator to work out differences between all parties that have submitted claims for portions of the channel. If a settlement is not agreed upon within 60 days (or some other reasonable period), then disputes would be settled by lottery. This would remove both the FCC and the cable operator from the process of allocating capacity.

In the unlikely event that two programmers submit use requests at exactly the same time (i.e., for the last full-time channel), then the conflict would also be solved using the mediation-lottery process described above.

5) How will the emergence of alternative multichannel video programming distributors (e.g., direct-to-home satellite services, satellite master antenna systems, and video dialtone), with or without comparable leased-access requirements, affect the choice of method for setting leased-access rates?

CME does not believe that the mere emergence of some alternative multichannel video programming distributors is relevant to the setting of rates for cable leased-access. The state of competition between cable and other services, like Direct Broadcast Satellite (DBS), is insufficient to create an effectively competitive market, and thus should not affect FCC policy decisions. If serious competition were to develop in the video services market, then it may be possible for *commercial* leasing to be guided by market rates. However, this is certainly premature at this time.

The emergence of serious competition in the video services market still shouldn't affect the *noncommercial* rates for leased-access. The very point of establishing noncommercial rates is the recognition is that nonprofit use of leasing channel capacity should not be solely driven by the market. CME and many others in the nonprofit community are working to make sure that every modality (i.e., video dialtone, DBS, etc.) permits nonprofit access.

6) When calculating incremental cost, is the cost to use a blank channel different from the cost of an occupied channel, i.e., is the existing use of the channel relevant? Is cost related to the number of systems that carry a channel? Assuming opportunity costs are relevant, what should be included to calculate these costs? Should incremental cost take into account subscriber revenues, advertising revenues, and programming costs? Should the cost calculation take into account the cost to create the channel? How should the cost to create the channel be calculated?

The existing use of the channel is not relevant to determining the incremental cost of leasing a channel. As explained in our meetings by Dr. Mark Cooper, Research Director for the Consumer Federation of America, CME believes that the accepted definition of the incremental rate would be the cost that the cable operator saves if the channel goes dark. This calculation would also not take into account the number of systems that carry a channel.

While the law does allow cable operators to run programming on unused leased-access capacity, Congress clearly intended that a certain portion of cable systems (up to 15%) should be leased to unaffiliated programmers. The FCC would contradict the intent of the law if, when determining rates for leased-access, it took into account the potential revenue that cable operators would lose by not running their own programming on channels designated for leased-access.

For both reasons, CME does not believe that an incremental rate should take into account opportunity costs, including factors like subscriber revenues, advertising revenues, and programming costs. Yet even if these factors were calculated into a rate, the additional costs would be minimal, if not zero. Subscriber revenues would generally not be affected, since most consumers will not base their decisions on subscribing to cable on the different content of a few channels. Cable operators would not have programming costs, since the lessee would provide the programming, and thus incur all the costs. While in theory the cable operator might lose advertising revenue, this would not occur on the vast majority of cable systems. The industry practice is for cable operators to sell local advertising on only the most popular channels on the cable system (typically 10-12 channels). To accommodate leased-access programmers, a cable operator probably will remove less popular channels on which local advertising is not sold.

As we have argued, opportunity costs are not relevant in determining the incremental cost. However, even if opportunity costs were calculated as part of the nonprofit rate, the additional costs would be minimal.

When calculating an incremental rate for noncommercial use of leased-access capacity, the FCC also should not take into account the opportunity costs of not leasing this capacity to commercial programmers. First, as stated above, incremental costs do not include opportunity costs by definition. Second, if noncommercial rates had to include the opportunity costs of not leasing capacity to a commercial lessee, then noncommercial rates would rise to commercial—and prohibitive—levels. This is not what Congress intended when it gave the FCC authority to set different levels of rates for different types of services, and when Congress specifically mentioned the needs of not-for-profit entities in the legislative history of the 1984 Cable Act.

The cost to create an individual channel is taken into account with our recommendation of incremental cost. The incremental cost, by definition, does not include the cost of building or upgrading the cable system. CME does not believe that using this rate for noncommercial programmers would have any overall adverse effect on cable operators.

Thank you for your interest in this matter. If you have any questions, please feel free to call CME.

Sincerely,

Jeff Chester
Executive Director
Center for Media Education

(JC)
Bradley Stillman
Legislative Counsel
Consumer Federation of America

cc: John Nakahata, Office of the Chairman, FCC
Meredith Jones, Cable Services Bureau, FCC
Angela Campbell, Institute for Public Representation, Georgetown
Henry Geller